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## THE WAR ON ERROR

### THE SCRIVENER'S ERROR DOCTRINE AND TEXTUAL CRITICISM: CONFRONTING ERRORS IN STATUTES AND LITERARY TEXTS

David M. Sollors\*

#### I. THE LAW AS TEXT

Anyone who endeavors to communicate will inevitably encounter errors, either as a speaker or a listener, as a writer or a reader. Linguists have observed that even those who are entirely "competent" speakers of a language will routinely make a large number of errors of grammar, pronunciation, and word-choice while "performing"—speaking or writing.<sup>1</sup> Those communicative media that rely on the mechanisms of publication can experience particular foibles as a result of the journey from inspiration to publication. "This typewriter can mis-spell by itself,"<sup>2</sup> wrote Ernest Hemingway, a notoriously "unreliable speller,"<sup>3</sup> pointing out one source of error. Even in the unlikely event that the manuscript an author hands to a publisher is flawless, there are always opportunities to

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1. See NOAM CHOMSKY, ASPECTS OF THE THEORY OF SYNTAX 4 (1965) (differentiating "competence" (general knowledge of a language), from "performance" (particular utterances or iterations of that language)); see also FERDINAND DE SAUSSURE, COURSE IN GENERAL LINGUISTICS 13–14 (Charles Bally & Albert Reidlinger eds., Wade Baskin trans., 1959) (describing a comparable set of binary terms, "langue" (language) and "parole" (speech)).

2. James Hinkle, "Dear Mr. Scribner"—*About the Published Text of The Sun Also Rises*, 6 HEMINGWAY REV. 43, 43 (1986) (quoting Letter from Ernest Hemingway to Malcolm Cowley, critic and poet (June 1, 1951)).

3. Hinkle, *supra* note 2, at 49.

introduce errors further along the way. Famously, the draft of the Declaration of Independence submitted to the printer, in Thomas Jefferson's hand and having been edited somewhat by the Continental Congress before being approved on July 4th, 1776, referred to "inalienable" rights.<sup>4</sup> But the first printed broadsheet of the Declaration read "unalienable" instead.<sup>5</sup> Historian Julian Boyd has suggested that

[This alteration] may possibly have been made by the printer rather than at the suggestion of Congress. The Rough Draft reads "inalienable" without any indication of change made in Congress. None of the copies made by Jefferson has the form "unalienable" . . . . The copy printed by Dunlap and inserted in the Rough Journal of Congress is the first official copy that has the form "unalienable," . . . . Both forms were apparently current in the eighteenth century but, since this is the only change in Jefferson's spelling made by Congress—or by any of the Committee—and since none of Jefferson's copies indicate a change made by Congress, it may possibly be that we are indebted to John Dunlap, or a faulty proofreader, for this one.<sup>6</sup>

Certainly legislation, which can deal with very technical matters in minute detail and at great length, and which is often subject to repeated revisions throughout the drafting process, is as prone to error as any other textual medium. Michael Fried cites a paradigmatic instance:

In 1934, the Louisiana legislature enacted a statute that authorized litigants to impeach the testimony of their opponents "in any unlawful way." This text would have been identical to that of the corresponding section of a 1908 statute that it replaced, but for the unexplained addition of the prefix "un-" to the word "lawful."<sup>7</sup>

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4. JULIAN P. BOYD, *THE DECLARATION OF INDEPENDENCE: THE EVOLUTION OF THE TEXT* 32 (Gerard W. Gewalt ed., 1999).

5. *Id.* at 32.

6. *Id.* at 33–34. Note that the term "inalienable," from the handwritten draft, is perhaps more familiar. According to the National Archives and Records Administration, the official text is "unalienable." See *THE DECLARATION OF INDEPENDENCE* para. 2 (U.S. 1776), available at [http://www.archives.gov/exhibits/charters/declaration\\_transcript.html](http://www.archives.gov/exhibits/charters/declaration_transcript.html). The State Department adds "inalienable" in brackets. See *THE DECLARATION OF INDEPENDENCE* para. 2 (U.S. 1776), available at <http://usinfo.state.gov/products/pubs/hrintro/declare.htm>.

7. Michael S. Fried, *A Theory of Scrivener's Error*, 52 *RUTGERS L. REV.* 589,

Thus, in both law and literature, which have in common the vicissitudes of the publication process, theorists and practitioners grapple with clerical and typographical mistakes. Just as judges must decide whether to correct statutory provisions that they suspect contain errors, so too must textual critics—scholars who produce “critical editions” of literary and historical texts—decide whether to correct suspected errors in manuscripts or previous editions of works. This article compares the ways that judges and textual critics address these errors, and looks to the history of textual criticism for guidance in determining the scope of discretion that should be afforded to judges applying the scrivener’s error doctrine.

## II. THE SCRIVENER’S ERROR DOCTRINE

The scrivener’s error doctrine, broadly speaking, is a common law doctrine allowing courts encountering legal documents they believe to be in error due to a *vitium scriptoris*—literally “the mistake of a scribe,” or any “clerical error in writing”<sup>8</sup>—to ignore the error and apply instead what they believe to be the correct law.<sup>9</sup> The term is a relatively recent import into statutory interpretation from the realm of contracts and wills,<sup>10</sup> but the practice of judicial correction of suspected errors by interpretation is neither recent nor uncommon. In the case cited above, for instance, in which the Louisiana legislature accidentally passed a statute reading “unlawful” instead of “lawful,” the Supreme Court of Louisiana “casually dismissed [the statute’s] literal meaning *sua sponte* and without citation.”<sup>11</sup> The court there recognized “ ‘the fact—which is obvious—that this substitution of the word “unlawful” for the word “lawful” was an accident’ and announced that it would ‘continue to read the law as it was originally written’ in the 1908 statute.”<sup>12</sup>

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589 (2000) (footnotes omitted).

8. BLACK’S LAW DICTIONARY 1567 (7th ed. 1999).

9. *Id.* at 563.

10. See Fried, *supra* note 7, at 594 (“The expression appears to have originated in discussions of such mistakes in the context of contracts and wills, rather than statutes. It is ironic that the phrase ‘scrivener’s error’ has only recently become [*sic*] to be commonly applied to statutes, long after the decline of the scrivener profession had rendered it an anachronism.”).

11. *Id.* at 590.

12. *Id.* (citing *Scurto v. Le Blanc*, 184 So. 567, 574 (La. 1938)).

From the Louisiana court's response to the erroneous statute, we can see the dilemma faced by judges who come across apparent errors in the statutes they are sworn to faithfully uphold. To enforce the law as written would lead to absurd and unjust results, and might arguably require the court to act *against* the wishes of the legislature. But such "casual" treatment of statutory text also raises suspicion of judicial infringement on legislative prerogatives, creating "an invitation to judicial lawmaking," as Justice Scalia puts it.<sup>13</sup>

A general concern about "judicial activism" impels the textualist approach to statutory construction. As John Manning writes, "[m]odern textualism . . . maintains that . . . respect for the legislative process requires judges to adhere to the precise terms of statutory texts."<sup>14</sup> Nevertheless—in recognition of situations like the "unlawful" Louisiana statute—Justice Scalia, perhaps the foremost textualist in American jurisprudence, supports allowing judges to reform statutes containing scrivener's errors.<sup>15</sup> But in keeping with textualism's strong emphasis on the duty of courts to follow statutes as written, and seemingly in response to a sense that courts have traditionally corrected errors somewhat "casually" and unsystematically, Scalia has attempted to articulate a narrow and more methodical doctrine of scrivener's error, and it is this particular formulation that will be the focus of legal analysis in this Article.

Because Scalia defines the scrivener's error doctrine as it relates to the so-called "absurdity doctrine," it will be of benefit here to briefly discuss the absurdity doctrine. The absurdity doctrine allows judges to "deviate from even the clearest statutory text when a given application would otherwise produce 'absurd' results."<sup>16</sup> The doctrine is famously associated with the *Church of the Holy Trinity v. United States* case,<sup>17</sup> but as that case is perhaps a

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13. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 21 (Amy Gutmann ed., 1997).

14. John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2390 (2003).

15. Scalia, *supra* note 13, at 20–21.

16. Manning, *supra* note 14, at 2388 (footnote omitted).

17. *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892) (holding that the Alien Contract Labor Act did not proscribe an American

controversial application of the doctrine,<sup>18</sup> a citation from an earlier Supreme Court opinion might serve as a preferable articulation:

The common sense of man approves the judgment mentioned by Puffendorf,<sup>19</sup> that the Bolognian law which enacted, “that whoever drew blood in the streets should be punished with the utmost severity,” did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit . . . . And we think that a like common sense will sanction the ruling we make, that the act of Congress which punishes the obstruction or retarding of the passage of the mail, or of its carrier, does not apply to a case of temporary detention of the mail caused by the arrest of the carrier upon an indictment for murder.<sup>20</sup>

While some scholars view scrivener’s error as “a form of the absurdity doctrine,”<sup>21</sup> others persuasively argue that the two doctrines are conceptually distinct.<sup>22</sup> Justice Scalia, as noted above, characterizes the difference between the scrivener’s error doctrine (which he accepts) and the absurdity doctrine (which he does not) as the difference between “a mistake of expression” (scrivener’s error) and a mistake of “legislative wisdom” (absurdity).<sup>23</sup> According to Scalia, “Congress can enact foolish statutes as well as wise ones, and it is not for the courts to decide which is which and rewrite the former.”<sup>24</sup> “The text is the law, and it is the text

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church’s hiring of an English clergyman, because that was an absurd outcome unintended by the legislature).

18. See, e.g., Scalia, *supra* note 13, at 18–23 (arguing that the decision was “wrong because it failed to follow the text.”).

19. The name of the seventeenth century German philosopher Samuel von Pufendorf was spelled “Puffendorf”—an occasional variant, but generally considered a misspelling—in the Supreme Court’s opinion. Manning has quoted the erroneous spelling faithfully, but without comment. See, e.g., Library of Congress Authorities, Authority Record for “Von Pufendorf, Samuel,” [http://authorities.loc.gov/cgi-bin/Pwebrecon.cgi?AuthRecID=27426&v1=1&HC=1&SEQ=20081028021512&PID=E9RBR-2g3CaTbRz9\\_ZZgs3ak](http://authorities.loc.gov/cgi-bin/Pwebrecon.cgi?AuthRecID=27426&v1=1&HC=1&SEQ=20081028021512&PID=E9RBR-2g3CaTbRz9_ZZgs3ak) (indicating “Pufendorf” as the main heading, but listing “Puffendorf” as a variant) (last visited Oct. 27, 2008).

20. *United States v. Kirby*, 74 U.S. 482, 487 (1868), *quoted in* Manning, *supra* note 20, at 2388.

21. Manning, *supra* note 14, at 2459 n.265.

22. See, e.g., Fried, *supra* note 7, at 595 (contrasting scrivener’s error, “an error of expression” with “a mistake regarding the consequences of intended language”).

23. Scalia, *supra* note 13, at 20.

24. *Id.*

that must be observed," he writes.<sup>25</sup> "It is simply not compatible with democratic theory that laws mean whatever they ought to mean, and that unelected judges decide what that is."<sup>26</sup> Thus, under Scalia's schema, a court may employ the scrivener's error doctrine only "where on the very face of the statute it is clear to the reader"<sup>27</sup> that a *vitium scriptoris* has made its way into a statute.

It should be noted that textualism is hardly universally accepted by jurists or scholars.<sup>28</sup> Indeed, under various forms of the competing jurisprudential philosophy of intentionalism, there would be little or no need to distinguish carefully between scrivener's error and the absurdity doctrine, as Dean Aleinikoff explains:

Unlike textualism, which sees the words of the statute as "law," intentionalism locates statutory law beyond, or behind, the statutory language. The actual words used by the legislature may be strong evidence of its intent, but they are merely windows on the legislative intent (or purpose) that is the law.<sup>29</sup>

There is little doubt, however, that in the federal courts today, intentionalism no longer monopolizes the judiciary, while textualism has gained a number of influential adherents, as Manning writes:

In the past decade and a half, the Supreme Court has increasingly subscribed to [textualism], emphasizing that legislation routinely has unintended consequences and that judges must give effect to the actual commands embedded in clearly worded statutes rather than to the apparent background intent of the legislators who voted for them.<sup>30</sup>

Whether or not this is so, it seems clear that the scrivener's error doctrine is especially problematic under the schema of textualism,<sup>31</sup> and this Article is largely an analysis of the

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25. *Id.* at 22.

26. *Id.*

27. *Id.* at 20.

28. T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 Mich. L. Rev. 20, 23-24 (1988).

29. *Id.*

30. Manning, *supra* note 14, at 2390.

31. *But see* Fried, *supra* note 7, at 590-91 (arguing that the scrivener's error doctrine "seems to pose serious difficulties even for other construction approaches," including the canon of construction that "evidence of legislative

textualist response to the scrivener's error doctrine.

Because of Justice Scalia's leading role in the textualist school, his jurisprudence of the scrivener's error doctrine has been tremendously influential. *Holloway v. United States* is a case in which neither Scalia, in dissent, nor the seven-member majority found a scrivener's error, but which nevertheless illustrates the contours of Scalia's emerging doctrine on errors.<sup>32</sup> *Holloway* required the Court to interpret a federal statute criminalizing carjacking "with the intent to cause death or serious bodily harm."<sup>33</sup> The defendant, who had stolen several cars by threatening their drivers with a gun, was convicted on three counts of carjacking.<sup>34</sup> The testimony of the defendant's accomplice indicated that their "plan was to steal the cars without harming the victims, but that [the defendant] would have used his gun if any of the drivers had given him a 'hard time.' When one victim hesitated, petitioner punched him in the face but there was no other actual violence."<sup>35</sup> At issue on appeal, in the words of the Court, was whether the intent element in the statute "requires the Government to prove that the defendant had an unconditional intent to kill or harm in all events, or whether it merely requires proof of an intent to kill or harm if necessary to effect a carjacking."<sup>36</sup> The majority affirmed the conviction, asserting that, in light of the legislative history and apparent purpose of the statute, "a commonsense reading of the carjacking statute counsels that Congress intended to criminalize a broader scope of conduct than attempts to assault or kill in the course of

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intent may not be consulted when the text is unambiguous").

32. *Holloway v. United States*, 526 U.S. 1 (1999).

33. *Id.* at 3 & n.1 ("Whoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall — (1) be fined under this title or imprisoned not more than 15 years, or both, (2) if serious bodily injury (as defined in section 1365 of this title, including any conduct that, if the conduct occurred in the special maritime and territorial jurisdiction of the United States, would violate section 2241 or 2242 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both, or sentenced to death.") (emphasis in original).

34. *Holloway*, 526 U.S. at 4.

35. *Id.* (citation omitted).

36. *Id.* at 3.



automobile robberies."<sup>37</sup>

Justice Scalia contested the majority's confidence about the legislative intent behind the statute, contending that "one can best judge what Congress 'obviously intended' not by intuition, but by the words that Congress enacted, which in this case require intent (not conditional intent) to kill."<sup>38</sup> Scalia's analysis, rather than inquiring into what Congress did or did not intend (an inquiry he considers highly problematic), asked whether Congress *plausibly* could have meant for the higher (non-conditional) intent standard to govern. His answer was yes: "It is not at all implausible that Congress should direct its attention to this particularly savage sort of carjacking—where killing the driver is part of the intended crime."<sup>39</sup>

This analysis, of course, is consonant with Justice Scalia's articulated theories of jurisprudence.<sup>40</sup> But what is most relevant here is Scalia's discussion of how this analysis relates to his theory of the scrivener's error doctrine:

Note that I am discussing what was a *plausible* congressional purpose in enacting this language—not what I necessarily think was the real one. I search for a plausible purpose because a text without one may represent a "scrivener's error" that we may properly correct. There is no need for such correction here; the text as it reads, unamended by a meaning of "intent" that contradicts normal usage, makes total sense. If I *were* to speculate as to the *real* reason the "intent" requirement was added by those who drafted it, I think I would select neither the Court's attribution of purpose nor the one I have hypothesized. . . . I suspect the "intent" requirement was inadvertently expanded beyond the new subsection 2119(3), which imposed the death penalty—where it was thought necessary to ensure the constitutionality of that provision. Of course the actual intent of the draftsmen is irrelevant; we are governed by what Congress enacted.<sup>41</sup>

Here, Scalia articulates (in dictum, admittedly) a rather strict doctrine of scrivener's error, wherein any statutory

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37. *Id.* at 7.

38. *Id.* at 18 (Scalia, J., dissenting).

39. *Id.* at 19.

40. See generally Scalia, *supra* note 13.

41. *Holloway v. United States*, 526 U.S. 1, 19 n.2 (1999) (Scalia, J., dissenting) (citations omitted).

provision possessing a threshold plausibility of purpose will be upheld, even where—as here—the reviewing judge speculates that the provision contained a drafting error.<sup>42</sup> Scalia would call this suspected error one of “wisdom,” and thus uncorrectable.<sup>43</sup> The distinction between errors of wisdom and those of expression is often difficult to make, however, and Scalia’s plausibility inquiry also seems to blur the line between scrivener’s error and absurdity.<sup>44</sup> Would Scalia enforce a statutory provision that was “plausible”—i.e., not absurd—on its own terms, when the extrinsic evidence strongly suggests that the provision contains a clerical error?<sup>45</sup>

Having introduced the legal response to the problem of clerical and typographical errors, we now address how similar problems are dealt with in the field of textual criticism.

### III. TEXTUAL CRITICISM AND ERROR

Textual criticism, or “that part of textual scholarship charged with interrogating the text and preparing it for public consumption, usually in the form of a scholarly edition,”<sup>46</sup> has been called the “most ancient of scholarly activities in the West.”<sup>47</sup> Indeed, the very idea seems to have arisen almost at the moment that oral literary traditions began to be written down, most particularly in Greece, where some of the earliest textual scholars turned their attention to producing written accounts of Homer’s epics.<sup>48</sup> By the time Alexander extended the Hellenistic dominion to Ptolemaic Egypt, a Greek practice of textual criticism was already

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42. See *id.*

43. See Scalia, *supra* note 13, at 20.

44. Perhaps Scalia’s disapproval of the *Holy Trinity* holding, Scalia, *supra* note 13 at 18–23, is not because he rejects the absurdity doctrine outright, but rather because he has a different definition of “absurdity” than the *Holy Trinity* Court did. Does Scalia mean that the Alien Contract Labor Act’s inclusion of clergy was a *plausible* congressional purpose, and thus should be enforced? Or is Scalia saying that the Act was *clear*, and thus not subject to the plausibility test? In any case, if Scalia would not enforce a statute with an implausible congressional purpose—regardless of whether there is extrinsic evidence of intent—that seems merely to redefine “absurdity” in terms of “plausibility.”

45. See *infra* Part III for further discussion of this question.

46. D.C. GREETHAM, TEXTUAL SCHOLARSHIP: AN INTRODUCTION 295 (1994).

47. *Id.* at 297.

48. *Id.*

several hundred years old.<sup>49</sup> Towards the end of the third century B.C., the librarians of Alexandria devoted themselves to producing "standard" critical editions" of the works of Greek authors from among many variant manuscripts housed at the great library.<sup>50</sup>

Textual critics of the modern era confront the same issues as did their classical forebears. As the German textual critic Paul Maas writes, "[t]he business of textual criticism is to produce a text as close as possible to the original . . . ."<sup>51</sup> A primary concern of textual criticism is the creation of a single edition from many differing variants.<sup>52</sup> For oral texts, like *The Iliad*, there may be multiple extant transcriptions;<sup>53</sup> even for more recent texts, the intricate process of pre-publication editing at a modern publisher can result in many changes to a manuscript. For example, Maxwell Perkins, Ernest Hemingway's editor at Scribner, asked Hemingway to remove the phrase "Bulls have no balls" from the first edition of *The Sun Also Rises* in 1926.<sup>54</sup> Hemingway allowed the line to be changed to "Bulls have no horns,"<sup>55</sup> but in a later edition, in 1954, Scribner restored the bawdier original version.<sup>56</sup> In another example, G. Thomas Tanselle, a leading contemporary theorist of textual criticism, and one of the best-known Melville editors, writes that "Herman Melville, after the publication of *Typee* (1846), was asked by his American publisher, Wiley & Putnam, to soften his criticism of the missionaries in the South Seas for a revised edition, and in July 1846 he complied by deleting about thirty-six pages of material and revising other passages."<sup>57</sup> Melville's deletions were never restored during his life, but Tanselle and his co-editors restored the first edition text in their

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49. *Id.*

50. *Id.* at 298; see also JOHN EDWIN SANDYS, A SHORT HISTORY OF CLASSICAL SCHOLARSHIP 41-43 (1915).

51. PAUL MAAS, TEXTUAL CRITICISM 1 (Barbara Flower trans., 1958).

52. *Id.*

53. GREETHAM, *supra* note 46, at 298.

54. Hinkle, *supra* note 2, at 43-44.

55. *Id.* at 44.

56. *Id.*; see ERNEST HEMINGWAY, THE SUN ALSO RISES 159 (Charles Scribner's Sons 1954) (1926).

57. G. THOMAS TANSELLE, *The Editorial Problem of Final Authorial Intention in TEXTUAL CRITICISM AND SCHOLARLY EDITING* 27, 53 (1990) [hereinafter TANSELLE, *Problem*].

critical edition of *Typee*.<sup>58</sup> Decisions like these raise the same complex questions about how best to honor the intent of an author that we have seen in statutory interpretation.

For most critical editions, the textual critic's first task is to identify a "copy-text"—a baseline version of the work—from among the variants.<sup>59</sup> Much of the theory of textual criticism is dedicated to the development of a methodology for this selection, the classical term for which is *recensio* or recension.<sup>60</sup> The next step, then, is to make changes, or "emendations," incorporating parts of other variants or correcting perceived errors.<sup>61</sup> A particularly scientific school of textual criticism, usually associated with the nineteenth-century German philologist Karl Lachmann, attempted to systematize the critical approach to the text.<sup>62</sup> Lachmann's follower Paul Maas, articulated this approach:

In each individual case the original text either has or has not been transmitted. So our first task is to establish what *must* or *may* be regarded as transmitted—to make the recension (*recensio*); our next is to examine this tradition and discover whether it may be considered as giving the original (*examinatio*); if it proves not to give the original, we must try to reconstruct the original by conjecture (*divinatio*) . . . .<sup>63</sup>

Maas extended Lachmann's "stemmatic" method of analyzing variants according to their genetic relationship to the archetype, going as far as to diagram the method in his influential book *Textual Criticism* (see figure 1, below).<sup>64</sup>

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58. 1 HERMAN MELVILLE, *TYPEE: A PEEP AT POLYNESIAN LIFE* (Harrison Heyford, Hershel Parker & G. Thomas Tanselle, eds., Northwestern University Press 1968) (1846).

59. MAAS, *supra* note 51, at 1.

60. The term recension can be confusing, however, because it has several meanings, including the process of choosing a copy-text from among variants, as well as: "[a] critical revision of a text incorporating the most plausible elements found in varying sources," and "[a] text so revised." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1459 (4th ed. 2000).

61. MAAS, *supra* note 51, at 1.

62. *Id.*

63. MAAS, *supra* note 51, at 1.

64. *Id.* at 5 fig.1.

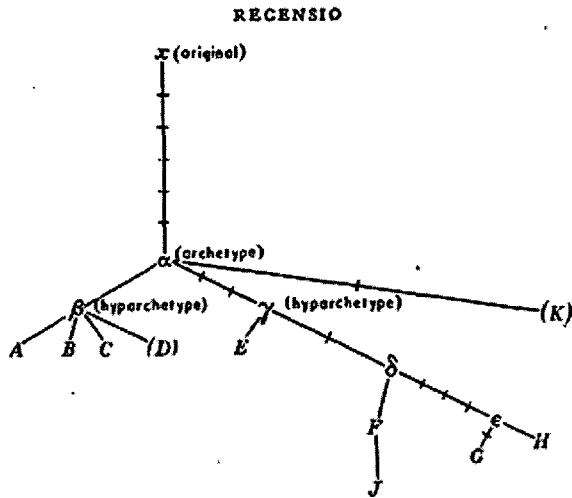


Figure 1. Textual Criticism Diagram

Maas also addressed situations in which the critic has only one manuscript available ("*codex unicus*") rather than several variants.<sup>65</sup> In this case, he writes, "*recensio* consists in describing and deciphering as accurately as possible the single witness."<sup>66</sup> Because a judge rarely encounters differing variants of applicable statutes, this *codex unicus* method seems most analogous to statutory interpretation.<sup>67</sup> The Lachmann/Maas school of textual criticism—often referred to as "objective" because of its attempt both to formalize the process of textual criticism and to restrict the subjective judgment of the critic—seems reminiscent of Scalia's systematization of the scrivener's error doctrine. Lachmann and other like-minded objective textual critics may also have been similarly motivated; according to Tanselle:

In the nineteenth century . . . the genealogical approach to . . . textual criticism, now associated with the name of Karl Lachmann, emerged from a desire to minimize the role of judgment in combining readings from variant texts and was thus a reaction to the less disciplined eclecticism of many eighteenth-century editors, who often altered

65. See *id.* at 2.

66. *Id.*

67. But see *infra* text accompanying notes 128–29. for discussion of statutory variants.

texts according to their personal tastes.<sup>68</sup>

More subjective schools of textual criticism have emerged in response to Lachmann's stemmatic technique.<sup>69</sup> "Subjective" criticism is characterized by its more "open acceptance of judgment" on the part of the critic, accepting that decisions about emending texts would always be personal and irreducible to mathematical or scientific formulations.<sup>70</sup> In fact, the conflict between the more "objective" (or "conservative") schools of textual critics, like Lachmann, and the more "subjective" critics, sometimes called "conjecturalists,"<sup>71</sup> seems to go back to the beginning of textual criticism itself; the librarians of Pergamon developed a more "objective" critical methodology in response to their rivals at Alexandria.<sup>72</sup> Tanselle describes the history of textual criticism as "constantly [reverberating] with alternating claims about the place of judgment in the process [of reconstructing the past]."<sup>73</sup> Just as legal textualism arose, to some considerable extent, as a response to a perception that intentionalism had gone too far, giving judges an "invitation to judicial lawmaking,"<sup>74</sup> so, too, did Lachmann's "objective" formalism respond to a perception of eighteenth-century conjecturalism gone too far.<sup>75</sup>

Perhaps the most notoriously subjective critical edition in English literature is the 1732 edition of Milton's *Paradise Lost*, edited by Richard Bentley, "the most significant early eighteenth-century commentator on Milton."<sup>76</sup> According to textual critic D.G. Greetham:

[Bentley] postulat[ed] an amanuensis who had—perhaps deliberately—misrepresented what Milton dictated . . . . The theory was that since Milton was blind he could not correct the amanuensis's errors (in fact, that he did not

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68. G. THOMAS TANSELLE, *Editing Without a Copy-Text*, in LITERATURE AND ARTIFACTS 236, 236 (1998) [hereinafter TANSELLE, *Editing*].

69. *Id.*

70. *Id.*

71. GREETHAM, *supra* note 46 at 3.

72. See 1 JOHN EDWIN SANDYS, A HISTORY OF CLASSICAL SCHOLARSHIP 150–51 (1958).

73. TANSELLE, *Editing*, *supra* note 68, at 236.

74. Scalia, *supra* note 13, at 21.

75. TANSELLE, *Editing*, *supra* note 68, at 236.

76. Marcus Walsh, *Bentley Our Contemporary; or, Editors, Ancient and Modern*, in THE THEORY AND PRACTICE OF TEXT-EDITING 157, 162 (Ian Small & Marcus Walsh eds., 1992).

even know what the amanuensis had written), so that the textual critic now had to take up the poet's mantle and restore his text to a more "Miltonic" condition, in a development of the Alexandrian system . . . at its most extreme.<sup>77</sup>

Bentley's edition of *Paradise Lost* was met with outrage and censure by members of the English literary establishment,<sup>78</sup> among them Alexander Pope, who had prefaced his 1725 edition of Shakespeare with this anti-conjecturalist sentiment: "I have discharg'd the dull duty of an Editor . . . with a religious abhorrence of all Innovation, and without indulgence to my private sense or conjecture."<sup>79</sup>

Thus, a great many ideological questions come to bear when a textual critic encounters an error. As we have seen, even determining whether or not there is an error at all is a loaded question. As Tanselle writes:

The editor of a critical text sets out to eliminate from a particular copy-text what can be regarded as errors in it; defining what constitutes an "error" is therefore basic to the editorial procedure. Any concept of error involves the recognition of a standard: an editor can label certain readings of a text erroneous only by finding that they fail to conform to a standard.<sup>80</sup>

In order to illustrate the kinds of judgments that editors must make in determining both what constitutes an error and what (if anything) to do about it, Tanselle cites the classic instance of Keats's 1816 sonnet "On Looking Into Chapman's Homer," in which Keats mistakenly identified:

stout Cortez, when with eagle eyes

He stared at the Pacific . . .

Silent, upon a peak in Darien.<sup>81</sup>

In fact, it was Vasco Nuñez de Balboa—and not Hernán

77. GREETHAM, *supra* note 46, at 319.

78. See generally Walsh, *supra* note 76, at 166–78.

79. Alexander Pope, *Preface to 1 THE WORKS OF SHAKESPEARE*, at xxii (Alexander Pope, ed., 1725), quoted in Walsh, *supra* note 76, at 178.

80. G. THOMAS TANSELLE, *External Fact as an Editorial Problem*, in *TEXTUAL CRITICISM AND SCHOLARLY EDITING*, *supra* note 57, at 72, 73 [hereinafter TANSELLE, *External Fact*].

81. John Keats, *On Looking Into Chapman's Homer*, in *THE OXFORD BOOK OF ENGLISH VERSE, 1250–1900*, at 743 (A.T. Quiller-Couch ed., 1939), available at <http://www.bartleby.com/101/634.html>.

Cortés—who viewed the Pacific from Darién in Panama.<sup>82</sup> What kind of “error” is this? And what editorial action, if any, does it require?

Ultimately, Tanselle agrees with the scholarly consensus that the poem ought not be emended, stating that “[w]hether Keats intended to disregard historical fact or confused the historical Balboa with Cortez, however, need not be pondered, for there is no question that ‘Cortez’ is the word he put into the poem at this point . . . .”<sup>83</sup> Still, he contemplates alternatives: “If the word, through some error of transmission, had been misspelled in such a way as not to be recognizable as ‘Cortez’<sup>84</sup>—resulting perhaps in a name with no allusive significance or one with an inappropriate association—what would the editor do?”<sup>85</sup>

Here, we see the contours of Tanselle’s theory of textual errors. Broadly speaking, Tanselle argues that an editor has little cause to correct an error if the evidence demonstrates that the error in question is “the word [the author] put into” the work—that is to say, the author’s *intended* word. But if the error is one of “transmission,” the editor will have to consider whether or not to correct it. This question, however, is always constrained by the obligation of the editor to present the text intended by the author, without trying to alter or “improve” it. Just as textualists, particularly those influenced by public choice theory, insist that the precise terms of legislative compromise must be respected, even if they are inelegant or frustrating,<sup>86</sup> Tanselle explains that “[a] basic reason for allowing [inaccuracies] to stand, in fiction as well as nonfiction, is that the [passages] in that form may have ramifications that are unemendable—they may be the subject of a discussion in the text or may have influenced the

82. KATHLEEN ROMOLI, *BALBOA OF DARIÉN: DISCOVERER OF THE PACIFIC* 158 (1953).

83. Tanselle, *External Fact*, *supra* note 80, at 72–73.

84. Tanselle does not remark on the fact that “Cortez” is, itself, a less-favored (though prevalent) variant spelling of “Cortés.” See, e.g., Library of Congress Authorities, Authority Record for “Cortes, Hernán,” [http://authorities.loc.gov/cgi-bin/Pwebrecon.cgi?AuthRecID=3308322&v1=1&HC=1&SEQ=20081028023101&PID=XbJGzhBjM\\_rhplkzg5531S-4](http://authorities.loc.gov/cgi-bin/Pwebrecon.cgi?AuthRecID=3308322&v1=1&HC=1&SEQ=20081028023101&PID=XbJGzhBjM_rhplkzg5531S-4) (indicating “Cortés” as the main heading, but listing “Cortéz” as a variant) (last visited Oct. 27, 2008).

85. TANSELLE, *External Fact*, *supra* note 80, at 73.

86. See Manning, *supra* note 14, at 2417; see also *infra* text accompanying note 4.



author's thinking."<sup>87</sup> Thus, both textual critics and judges must balance the obligation to respect the idiosyncrasies in texts with a general obligation to present the most accurate rendition possible.

James Hinkle struggles with this dilemma in his essay on Hemingway's *The Sun Also Rises*,<sup>88</sup> and his analysis seems analogous to the complex process in which courts engage when determining whether and how to correct errors. Hinkle describes a number of errors in the text of Hemingway's novel as published by Scribner, many of which are misspelled French and Spanish words and incorrect place names.<sup>89</sup> Some examples include (with the published version on the left and Hinkle's suggested corrections, and some of his comments, on the right):

Rio de la Fabrica / Río de la Fábrica

aficion / afición

San Fermin / San Fermín . . .

Wetzel's / Vetzels (a real Paris restaurant known for its hors d'oeuvres . . . )

Veuve Cliquot / Veuve Clicquot . . .

globos iluminados / iluminados . . .

Saint Odile / Sainte Odile (since Odile is a female saint) . .

quelqu'une / quelqu'un ( . . . [Hemingway added] an "e" at the end. That must have seemed reasonable, for the "e" ending is feminine, and Brett is the one the concierge is talking about. But "quelqu'un" is a set expression in French and is always masculine. Hemingway apparently learned this before mailing the typescript, for the "e" was erased on the copy he sent to Scribner. Whoever was responsible for putting it back made a mistake.<sup>90</sup>)

terraces / terrasse –or, if changed to English, terrace (The Closerie des Lilas has only one terrace, and even if it had several Brett could sit on only one at a time.) . . .

Por ustedes / Para ustedes . . .

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87. TANSELLE, *External Fact*, *supra* note 80, at 107.

88. *See generally* Hinkle, *supra* note 2.

89. *See id.* at 50–52.

90. Truly, a "Scribner's error."

Centimes / Céntimos (This is on a Spanish sign, and Centimes is French, not Spanish.)<sup>91</sup>

Complicating Hinkle's call for these corrections is the fact that nearly all of the errors he identifies "appear in the present Scribner second edition exactly as Hemingway had them in his typescript."<sup>92</sup> Because these errors were in Hemingway's original manuscript, Hinkle cannot argue that these are, strictly speaking, errors of "transmission," and Hinkle, as a textual critic, must then decide whether these errors are consonant with some understanding of the author's intent. Are these errors—like Keats's "Cortez"—part of what Hemingway would have considered his work? "[W]e are not dealing with editorial carelessness or interference which introduced into an author's text a series of inferior readings," writes Hinkle, prompting him to ask whether "anyone [has] a right to make changes now (for any reason) in a dead author's text when we know they are changes the author had never contemplated[.]"<sup>93</sup> Hinkle's answer is yes, and to support his case for this proposition, he presents an in-depth literary analysis of the text of *The Sun Also Rises*, as well as biographical information about Hemingway, including evidence of the author's general attitude towards proofreading and accuracy.<sup>94</sup>

Hinkle's literary analysis revolves around the fact that Jake Barnes, the novel's narrator, is a reporter who has lived in Paris for several years.<sup>95</sup> Hinkle notes that Hemingway, who was a reporter for *The Kansas City Star* as a young man, took very seriously a journalistic credo of accuracy.<sup>96</sup> "The first page of the Stylebook of *The Kansas City Star* says 'Be vigilant to spell proper names correctly and get the right initials.' Hemingway said about the *Star* stylesheet: 'Those were the best rules I ever learned for the business of writing. I've never forgotten them.'"<sup>97</sup> That Jake, as a character, shares these values with his author is demonstrated by Jake's very precise descriptions—"Hemingway made Jake's

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91. Hinkle, *supra* note 2, at 50–51.

92. *Id.* at 53.

93. *Id.*

94. *Id.*

95. *Id.* at 48.

96. *Id.*

97. Hinkle, *supra* note 2, at 48 (citations omitted).

knowledge and correctness a major and repeated part of his characterization"<sup>98</sup>—even, on occasion, *ad absurdum*:

Sometimes his exactness is so much in excess of what the situation seems to call for that it directs attention to itself. Jake says Cohn "wore what used to be called polo shirts at school, and may be called that still." Who but an excessively exact man would not have been content with "He wore polo shirts?"<sup>99</sup>

This exactness, Hinkle argues, is undermined by the misspellings and incorrect references he has identified.<sup>100</sup> For example, Jake writes: "The President of the Council was in Lyons making a speech, or, rather he was on his way back."<sup>101</sup> Hinkle again notes the precision of expression—"Jake couldn't just say, as anyone else would, that the President was not in Paris because he was in Lyon making a speech, because that was not precisely true"—but argues that the erroneous spelling of "Lyon" as "Lyons" "torpedoes Hemingway's whole sequence about Jake's expertise and exactness."<sup>102</sup> "It is irrelevant to object that 'Lyons' is the acceptable British spelling for 'Lyon,' " Hinkle continues.<sup>103</sup> "An American living in Europe might still call Paris 'Paris' (not pa-REE) . . . , but there is no way an American newsman working the French beat for several years could still think of Lyon as 'Lions' [*sic*] . . . . This is especially true in a book in which Jake refers to Milan as 'Milano'. . . ."<sup>104</sup>

Thus, Hinkle argues that the errors in *The Sun Also Rises* are not plausibly in keeping with Hemingway's intent.<sup>105</sup> Hemingway intended his readers to be aware of Jake's accuracy and breadth of knowledge,<sup>106</sup> and errors in the text (which, according to the narrative frame of the novel, is "presented to us as a written performance by Jake

98. *Id.*

99. *Id.* (citation omitted).

100. *Id.*

101. *Id.* at 49.

102. *Id.*

103. Hinkle, *supra* note 2, at 49.

104. *Id.* at 49 n.9.

105. *Id.* at 53–57.

106. *See id.* at 48. Not least because it seems clear that Jake was a largely autobiographical character, and accuracy and breadth of knowledge were qualities in which Hemingway himself took pride. *See id.* ("[Hemingway] had 'an insatiable desire to be expert in all areas of life.' ") (citation omitted).

Barnes”<sup>107</sup>) frustrate that intent.

Having made this argument based on a literary reading of *The Sun Also Rises*, Hinkle proceeds to address the more factual and historical question of whether Hemingway might have intended the errors to go into the text (or, rather, whether he did *not* intend for them to be corrected) *despite* the fact that their presence might have undermined his intention to present Jake as a meticulously correct character.<sup>108</sup> Hinkle concedes that Hemingway was well-known for his insistence that publishers not alter his manuscripts without his consent,<sup>109</sup> but that this only extended to editors changing the “*words* he had written.”<sup>110</sup> Hinkle argues emphatically that Hemingway was “quite willing to accept changes on other matters concerning his text.”<sup>111</sup>

In fact [Hemingway] wanted *and expected* his editor’s assistance on spelling and punctuation. He is explicit about this. His letter to Perkins when he submitted the typescript of *SAR* says: “There are plenty of small mistakes for the person who reads it in Mss. to catch before it goes to the printer—misspelled words, punctuation etc.” . . .

. . . [H]e was very concerned that the eventual published text be correct. “Watch proof reading and typography—there is nothing can spoil a persons [*sic*] appreciation of good stuff like typographical errors. It’s like sour notes/chords in a piano concerto.”<sup>112</sup>

In addition to this evidence of Hemingway’s specific intent with regard to *The Sun Also Rises*, Hinkle also presents documentary evidence indicating that Hemingway was generally concerned with proper proofreading—especially regarding foreign languages—throughout his life.<sup>113</sup> Thus, Hinkle feels entirely confident in concluding that “[i]t could hardly be clearer . . . that it was Hemingway’s intention to avoid wrong spellings, wrong names, wrong foreign words in

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107. *Id.*

108. *Id.* at 54–57.

109. See Hinkle, *supra* note 2, at 54–55.

110. *Id.* at 55.

111. *Id.*

112. *Id.* (citation omitted).

113. See *id.* at 56–57.

his own work.”<sup>114</sup> The fact that the errors appear in the original manuscript of *The Sun Also Rises* and on galleys that Hemingway “read and approved tells us [he] was not a good speller or proofreader, but it certainly does not tell us he ‘intended’ the errors in any legitimate sense.”<sup>115</sup>

If Hinkle knew, or felt that it was likely, that Hemingway *did* intend—self-defeatingly, perhaps—for the errors to remain in the text, or that Hemingway didn’t care that they remained, regardless of their detrimental effect on the work, then Hinkle’s case to emend the errors would be seriously weakened, no matter how strongly he had argued that the errors “torpedoed” the literary effect of the novel. As Tanselle writes,

an editor’s task is not to “improve” upon an author’s decisions, even when he believes that the author made an unwise revision, and . . . an editor’s judgment is directed toward the recovery of what the author wrote, not toward an evaluation of the effectiveness of the author’s revisions.<sup>116</sup>

Tanselle’s use of “wisdom” as a matter about which an editor should not second-guess an author recalls Scalia’s similar comment that courts should refrain from rewriting “unwise” statutes.<sup>117</sup> Furthermore, Hinkle’s speculation into the possibility that Hemingway might have meant to include the errors in the text resembles Scalia’s plausibility analysis in *Holloway* (the carjacking case).<sup>118</sup> Unlike Scalia, however, Hinkle does not restrict his use of extrinsic evidence to determine whether the errors were intended or not, and one doubts that Hinkle would agree with Scalia’s comment that “the actual intent of the draftsmen is irrelevant.”<sup>119</sup>

In this brief examination of textual criticism we have already seen many parallels to legal interpretation. Now we continue to compare legal and non-legal responses to textual errors, with an emphasis on the implications of such a comparison for statutory interpretation.

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114. *Id.* at 57.

115. Hinkle, *supra* note 2, at 57.

116. TANSELLE, *Problem*, *supra* note 57, at 29 (footnote omitted).

117. Scalia, *supra* note 13, at 20; see also *infra* notes 151–54, for further discussion of this parallel.

118. See *supra* text accompanying notes 32–42.

119. *Holloway v. United States*, 526 U.S. 1, 19 n.2 (1999) (Scalia, J., dissenting).

## IV. PARALLELS AND IMPLICATIONS

There are certainly significant differences in the nature of the works that judges and textual critics interpret, and these differences affect the way that each identifies and addresses errors. Of course, interpretive questions in law almost always have immediate and pronounced effects on peoples' lives and livelihoods, while the decisions made by textual critics may have effects that are less clearly visible or direct. The case or controversy requirement means that, by definition, acts of judicial interpretation only take place when the outcome is important to at least one person. On the other hand, little may rest on a textual critic's decision to correct the spelling of a brand of champagne, or to add a feminine ending to the name of a female saint in *The Sun Also Rises*. But that is not to say that every legal interpretation is of graver import than every textual interpretation. Many works of literature, history, and philosophy have made profound impressions on the world.<sup>120</sup> The interpretation of a parking ordinance or a jaywalking statute, though certainly important to the individual making the argument, cannot objectively be said to be more significant than *any* non-legal textual interpretation.

Nevertheless, although both judges and textual critics must struggle to decide whether or not to amend suspected errors, textual critics have a compromise option that is not available to a judge: the critical "apparatus." The "apparatus" refers to footnotes, endnotes and any other marginalia that might set forth variants or identify possible errors. However, not all critical editions contain such marginalia, and, it must be noted, few readers pay much attention to them. Although the apparatus may take some of the pressure off of a textual critic to decide one way or another, it must be emphasized that the critic's decision is nevertheless still significant; the main text represents the critic's best estimate of the author's intent and it will be the only text read by the vast majority of readers.

In any case, even assuming that most questions of legal

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120. Recently, to choose a somewhat gruesome example, a genocide may have been impelled in part by the broadcast of provocative songs on Rwandan radio stations. See, e.g., PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA* (1998).

interpretation have graver consequences than most questions of literary interpretation, it is not entirely clear which way the different stakes should cut. In the face of the higher stakes for most legal interpretations, should judges be more conservative about defining and correcting errors? Or should courts, motivated by equity, be more active and "conjecturalist" in order to prevent injustice? Conversely, should textual critics feel more freedom to employ subjective editing techniques because literary interpretation has a less direct impact on peoples' lives? Because these questions cannot easily be answered in the abstract, any argument that advocates different strategies for addressing errors in law and literature cannot be based merely on the generalized differences between the two.

Some differences between legal and non-legal texts, however, may indeed suggest different methods of interpretation. For example, a large part of the task of textual criticism is the identification of the "copy-text"—the "best" text among variants. As Tanselle writes, "[t]he choice of copy-text—that text judged to have presumptive authority, the one to be followed at points where no emendations are made—is . . . the central decision for the critical editor to make."<sup>121</sup> Generally speaking, this is a step that interpreters of statutes need not take. Because the officially published statutory text is presumptively valid,<sup>122</sup> it is entitled to greater deference than, say, a non-legal text that is only one among several variants. But however great the presumption of validity invested in the text of statutes, cases arise in which the presumption is rebutted and the statutory text is found *not* to be the law.<sup>123</sup> In a Texas case, for example, a

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121. G. THOMAS TANSELLE, *Texts of Documents and Texts of Works*, in TEXTUAL CRITICISM AND SCHOLARLY EDITING, *supra* note 57, at 19 [hereinafter TANSELLE, *Texts*].

122. See 1 U.S.C. § 204(a) (2006).

123. See, e.g., *Simpson v. Union Stock Yards Co.*, 110 F. 799, 802 (D. Neb. 1901) ("The title of the act is very material, and is a constitutional requirement, and without which the act would be utterly void."); *State ex rel. Brassey v. Hanson*, 342 P.2d 706 (Idaho 1959) (holding that where a clerical error omitted an approved amendment reducing a tax rate from 3.5% to three percent, the bill was validly passed, but the tax rate was to be read as three percent). *But see Marshall Field & Co. v. Clark*, 143 U.S. 649, 680 (1892) ("[I]t is not competent for the appellants to show, from the journals of either house, from the reports of committees or from other documents printed by authority of Congress, that the enrolled bill . . . as finally passed, contained a section that does not appear in

small but significant change to the draft of a piece of legislation that had already been voted on by the Texas House and Senate was erroneously included in the enrolled copy presented to (and signed by) the governor, and promulgated in the published Texas code.<sup>124</sup> The Texas court held that the presumption of validity was rebutted “when the official legislative journals, undisputed testimony by the presiding officers of both houses, and stipulations by the attorney general acting in his official capacity conclusively show the enrolled bill signed by the governor was not the bill passed by the legislature . . .” and stated that “[t]o hold otherwise would raise form over substance, fiction over fact, and amount to government by clerical error.”<sup>125</sup>

Thus, like textual critics, judges must sometimes assess several variants to determine the correct statutory text. On the other hand, identifying a copy-text is not always difficult for textual critics—sometimes, as Paul Maas indicated, there is only one manuscript available (“*codex unicus*”),<sup>126</sup> and once a copy-text is selected, the textual critic’s task is, like a judge’s, to determine whether there is sufficient evidence of error to overcome the presumptive validity of the copy-text/law.

Inasmuch as both judges and textual critics seek to correct errors that are contrary to authorial intent, it is of note that while many literary, philosophical or historical works are the product of a single author, statutes are generally regarded as jointly authored by a legislature. It is beyond the bounds of this Article to catalog all of the problematic aspects of determining the collective intent of a legislature; according to Kent Greenawalt, “[f]ew subjects about legislative interpretation are as puzzling as the concept of legislative intent.”<sup>127</sup> It suffices to say that it is a complex affair to ascertain the relevant mental states of multiple legislators who may disagree with each other about the

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the enrolled act in the custody of the State Department.”); *Ames v. Union Pac. Ry. Co.*, 64 F. 165, 170 (D. Neb. 1894) (“[P]arol testimony . . . tending to show some verbal alterations in the bill after it had passed the house of representatives . . . is not admissible to impeach the validity of an act.”).

124. *Ass’n of Tex. Profl Educators v. Kirby*, 788 S.W.2d 827 (Tex. 1990).

125. *Id.* at 830.

126. *See supra* text accompanying note 66.

127. KENT GREENAWALT, *STATUTORY INTERPRETATION: 20 QUESTIONS* 91 (1999); *see generally id.* at 91–157.



intended wording of a statute, may have voted for the statute merely because of logrolling or some other compromise, or who may not have read the statute at all before voting. On the other hand, many published non-legal works are subject to extensive editing prior to publication. Recall that Hemingway agreed to allow Scribner to replace some off-color language in the first edition of *The Sun Also Rises*,<sup>128</sup> and Melville similarly acceded to his publisher's request to tone down some anti-missionary rhetoric in *Typee*.<sup>129</sup> The give-and-take of the editing process can be seen in some sense as analogous to the legislative process; authors may grudgingly agree to changes in order to achieve the greater end of getting their work published, just as legislators may grudgingly agree to bills in order to achieve some other goal (like ensuring the passage of other bills). Thus, even when they edit the works of single authors, textual critics can face difficulties similar to those faced by judges attempting to determine legislative intent.

This Article began with the assumption that judges construing statutes and textual critics editing texts both share the wish to correct errors that are contrary to legislative or authorial intent. But in what way does this wish conflict with the principles of textualism? Textualists like Justice Scalia are notoriously averse to legislative intent; as Scalia writes, "It is the *law* that governs, not the intent of the lawgiver. . . . Men may intend what they will; but it is only the laws that they enact which bind us."<sup>130</sup> Yet in order to identify a clerical error, any reader—whether of law or literature—cannot help but speculate about the intent of the author. According to Tanselle, "[i]ntention and error are inseparable concepts, because errors are by definition unintended deviations . . . ." <sup>131</sup> In response to Scalia's rejection of intent, Ronald Dworkin argues that "any coherent account of statutory interpretation *must* be based on assumptions about someone's (or some body's) intention, and . . . Scalia's own account accepts this . . . [by admitting] that

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128. See Hinkle, *supra* note 2, at 44.

129. See TANSELLE, *Problem*, *supra* note 57; see also MELVILLE, *supra* note 58.

130. Scalia, *supra* note 13, at 17.

131. TANSELLE, *Problem*, *supra* note 57, at 73.

courts should remedy 'scrivener's error.'"<sup>132</sup>

Accepting the scrivener's error doctrine entails acknowledging not only the presence and priority of authorial intent, but also that the text of a statute—despite being procedurally authoritative, despite bicameralism and presentment—is *not* the law. Locating the relevant work outside of its medium of expression is an easier step for textual critics to take; as Tanselle puts it, "[t]he medium of literature is the words . . . of a language . . . . Although the communication of literary works requires such vehicles as sound waves or the combination of ink and paper, the works do not depend on those vehicles for their existence . . . ."<sup>133</sup> Locating the law outside of the statutory text is much more difficult for judges—especially those judges who have a particular concern not to usurp legislative prerogatives. As Judge Easterbrook states crisply, "Statutes are law, not evidence of law. . . . The political branches adopt texts through prescribed procedures; what ensues is the law."<sup>134</sup>

Indeed; but what if the "text" adopted through prescribed procedures is not the same as the one printed in the relevant Code of laws? The U.S. Code specifically provides that "[t]he matter set forth in the edition of the Code of Laws of the United States . . . shall . . . establish *prima facie* the laws of the United States . . . ."<sup>135</sup> Case law indicates that on the federal level, inclusion of a provision within the U.S. Code does not mean that such provision is active law (for example, "[t]he fact that the words of [a repealed provision] have lingered on in the successive editions of the United States Code is immaterial," and does not indicate that the law is still in force),<sup>136</sup> and omission of a provision from the Code does not operate as a repeal.<sup>137</sup> Most state jurisdictions follow the

132. Ronald Dworkin, *Comment, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW*, *supra* note 13, at 115, 115.

133. G. THOMAS TANSELLE, *A RATIONALE OF TEXTUAL CRITICISM* 17 (1989).

134. *In re Sinclair*, 870 F.2d 1340, 1343–44 (7th Cir. 1989).

135. 1 U.S.C. § 204(a) (2006).

136. *Stephan v. United States*, 319 U.S. 423, 424–26 (1943) (denying defendant's direct appeal from a district court's sentence of death for treason because 1911 amendment repealed direct appeal to the Court in capital cases, notwithstanding the fact that the pre-1911 version "lingered on" in the published Code).

137. *Flensburg Dampfercompagnie v. United States*, 59 F.2d 464, 471 (Ct. Cl. 1932), (holding that statutes governing the duties on Prussian steamships were still in force, notwithstanding their accidental omission from the first

same principle; the official publication of laws constitutes prima facie evidence of the laws, but the presumption of validity can be rebutted.<sup>138</sup> Some federal cases indicate that enrolled statutes are unimpeachable.<sup>139</sup> Some states follow this so-called "enrolled bill rule."<sup>140</sup> But even in "enrolled bill rule" jurisdictions, exceptions seem possible, as in the Texas case cited above.<sup>141</sup>

The idea that the law is sometimes something other than what is written in statutes is properly met with resistance; as Scalia writes forcefully:

it is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather

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consolidated U.S. Code in 1926).

138. See 73 AM. JUR. 2D *Statutes* § 44 (2001); 1 NORMAN J. SINGER, *STATUTES AND STATUTORY CONSTRUCTION* § 15:17 (6th ed. rev. 2002). Titles of the U.S. Code that have been enacted into positive law (as twenty-four of fifty titles currently have been) are afforded somewhat stronger evidentiary effect than those titles that were merely compiled and "adopted" in the Code—"whenever titles of such Code shall have been enacted into positive law the text thereof shall be legal evidence of the laws therein contained . . . ." 1 U.S.C. § 204(a) (2006). Furthermore, conflicts between Statutes in Force and the U.S. Code are resolved in favor of Statutes in Force. See *Stephan*, 319 U.S. at 423–26.

139. See *Marshall Field & Co. v. Clark*, 143 U.S. 649, 672 (1892) ("[W]hen a[n] [enrolled] bill, thus attested, receives [the President's] approval, and is deposited in the public archives, its authentication as a bill that has passed congress should be deemed complete and unimpeachable.").

140. See 73 AM. JUR. 2D *Statutes* § 44 (2001).

141. *Ass'n of Tex. Prof'l Educators v. Kirby*, 788 S.W.2d 827, 830 (Tex. 1990). In *United States v. Pabon-Cruz*, the Second Circuit addressed a penal statute mandating that violators "shall be fined under this title or imprisoned not less than 10 years nor more than 20 years, and both." *United States v. Pabon-Cruz*, 391 F.3d 86, 97 (2d Cir. 2004). The court raised the construction of the statute sua sponte. See *id.* Both parties agreed that the rule as written was illogical. *Id.* at 98 ("As a grammatical matter, one cannot choose between 'A, or B, and both' . . . the text of the bill signed by the President does not match the text of the Conference Report."). However, to avoid the question of whether the enrolled bill rule prevented them from inquiring into the "accuracy or validity" of the language in question, the court accepted the text as it was, but interpreted it as a scrivener's error and read the statute as if it read "or both," as the Conference Report had originally provided, based on legislative history and on the rule of lenity. See *id.* This raises several questions. First, once a scrivener's error is identified, by what particular procedures may a court actually "correct" the error. Second, how do the scrivener's error doctrine and the enrolled bill rule interact? *Pabon-Cruz* would nearly seem to reduce the enrolled bill rule to a nullity. Nevertheless, unlike *Texas Prof'l Educators*, *Pabon-Cruz* is a case in which the statute is absurd on its face. The means of evading the enrolled bill rule in *Pabon-Cruz* would most likely not have applied to *Texas Prof'l Educators*. See *Pabon-Cruz*, 391 F.3d at 86.

than by what the lawgiver promulgated. That seems to me one step worse than the trick the emperor Nero was said to engage in: posting edicts high up on the pillars, so that they could not easily be read. Government by unexpressed intent is similarly tyrannical.<sup>142</sup>

Binding people to laws that were passed but not published, or denying them the benefit of their reliance upon laws that are repealed but not stricken from the law books, seems to violate a notice principle that is inherent to any fair legal system, namely that, at the least, those subjected to the law should have had the opportunity to apprise themselves of their rights and duties under that law before they should be subject to it. Enforcement of law without notice recalls Bentham's critique of the common law as "dog law": "When your dog does anything that you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog; and this is the way the judges make law for you and me."<sup>143</sup> But even the common law, according to Justice Holmes, is not a "brooding omnipresence in the sky."<sup>144</sup>

Judge-made law may arguably be less precise than statutory law, but those to whom it might be applied could conceivably read the relevant cases and understand to what law they are subject, and if it were not entirely clear, resolution of such ambiguity would be a matter of interpretation.<sup>145</sup> That is distinguishable from a situation in which a court applies a law contrary to the statutory text. Even in criminal law, where the maxim *ignorantia legis neminem excusat* has long held sway, nevertheless a criminal defendant may be excused if "the statute . . . defining the offense is not known to the actor and has not been published or otherwise reasonably made available prior to the conduct alleged"<sup>146</sup> or if the defendant's conduct was "in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in . . . a

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142. Scalia, *supra* note 13, at 17.

143. 5 JEREMY BENTHAM, THE WORKS OF JEREMY BENTHAM 235 (1843), quoted in EVA H. HANKS, ET AL., ELEMENTS OF LAW 172 (1994).

144. S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

145. It is beyond the scope of this Article to go into further depth about the common law, theories of precedence, etc.

146. MODEL PENAL CODE § 2.04(3)(a) (1962).

statute or other enactment.”<sup>147</sup>

Thus, in determining how to address possible errors in statutes, judges encounter multiple conflicting legal principles. Should a judge, respecting the exclusive constitutional grant of legislative power to the legislature, always apply the text of the law as officially promulgated? If the text of the law understood to be passed by the legislature differs from the text signed by the executive, or that promulgated by official publication, which version is the judge bound to apply? When will parties be held to laws of which they had no notice,<sup>148</sup> when will they be excused from complying with an erroneously published law,<sup>149</sup> and when will they be held to—or excused for relying on—the erroneous publication of a text contrary to the law that the legislature intended to enact?<sup>150</sup> Justice Scalia’s answer (as quoted previously in part) is appealingly simple:

Congress can enact foolish statutes as well as wise ones, and it is not for the courts to decide which is which and rewrite the former. I acknowledge an interpretive doctrine of . . . “scrivener’s error,” where on the very face of the statute it is clear to the reader that a mistake of expression (rather than of legislative wisdom) has been made. . . . I think it not contrary to sound principles of interpretation, in such extreme cases, to give the totality of context precedence over a single word. But to say that the legislature obviously misspoke is worlds away from saying that the legislature obviously overlegislated.<sup>151</sup>

This neat distinction, between legislative “misspeaking” and “overlegislation,” or, in other words, between errors of “wisdom” on the one hand, and those of “expression” on the other, seems quite apt. Indeed, as we have already seen, Tanselle articulates a constraining principle for textual critics

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147. § 2.04(3)(b)(i).

148. See *Flensburger Dampfercompagnie v. United States*, 59 F.2d 464 (Ct. Cl. 1932).

149. See *Ass’n of Tex. Prof’l Educators v. Kirby*, 788 S.W.2d 827 (Tex. 1990).

150. See *Lechner v. State*, 715 N.E.2d 1285, 1287–88 (Ind. Ct. App. 1999) (allowing seventeen-year-old defendant’s mistake of law defense to a charge of child molestation when a scrivener’s error accidentally permitted “the defense only when the actor believes the victim is 16 or older, when the statute itself does not prohibit the activity with a child aged 14 to 16”); see also *Smiley v. Holm*, 285 U.S. 355, 373 (1932) (holding that “inclusion [of a prior statutory provision] in the Code does not operate as a re-enactment . . .”).

151. Scalia, *supra* note 13, at 20–21.

in strikingly similar words: "an editor's task is not to 'improve' upon an author's decisions, even when he believes that the author made an unwise revision . . . . [A]n editor's judgment is directed toward the recovery of what the author wrote, not toward an evaluation of the effectiveness of the author's revisions."<sup>152</sup> Thus, an editor would overstep his bounds (and be condemned as a dolt) if he were to correct the grammar of Rimbaud's famous epistolary declaration "*Je est un autre*" (I is another).<sup>153</sup> But a textual critic might also have shirked his responsibility to effectuate an author's intent by reproducing, verbatim, a hand-written manuscript full of simple typographical errors that appeared to be contrary to the author's intent. Similarly, it would seem nothing less than an absurd abuse of judicial power for a judge who, for instance, personally opposed divorce, to "correct" the legislative "mistake" of allowing divorces by construing a statute permitting divorce as if it did not. On the other hand, it would also seem patently unjust for a judge in Louisiana to enforce the 1934 law—clearly in error—which authorized litigants to impeach the testimony of an opponent "in any unlawful way," by, as Michael Fried suggests, allowing a litigant to "test the credibility of an opponent by submerging the opponent under water to see whether the opponent floated . . . ."<sup>154</sup>

Cases in the latter category, where it seems that the only possible explanation for the statutory language is a clerical error, appear to be the ones Scalia has in mind for his scrivener's error loophole. Furthermore, Scalia argues that the "correct" text for which the error was substituted must be obvious: "the *sine qua non* of any 'scrivener's error' doctrine . . . is that the meaning genuinely intended but inadequately expressed must be absolutely clear . . . ."<sup>155</sup> But would such a doctrine allow the correction of the error in the *Texas Professional Educators* case? There, the original provision produced by a conference committee read: "This Act takes effect September 1, 1989, except that Section 5 takes effect

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152. TANSSELLE, *Problem*, *supra* note 57 at 29.

153. Letter from Arthur Rimbaud to Georges Izambard (May 13, 1871), in *LES LETTRES DU VOYANT* at 89 (Daniel Leuwers, ed., 1998).

154. See Fried, *supra* note 7, at 589–90.

155. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 82 (1994) (Scalia, J., dissenting).

September 1, 1990.”<sup>156</sup> As the court there explained,

After the conference committee report was signed but before the bill was enrolled, someone crossed out the number “5” by hand in section 23 of the bill and wrote the number “7” above the crossed-out number. The Senate voted to approve the conference committee report before the clerical change. It is uncertain whether this editorial change occurred before or after the House voted on the conference committee report. The change is not dated, signed, or initialed. The enrolled bill was definitely not the version passed by the Senate.

The clerical change of the “5” to the “7” was carried forward in the enrolling process. In particular, the clerical change was included in the enrolled bill as signed by the Lieutenant Governor, Speaker of the House, and Governor. Thus the enrolled version of the bill, certified to have been as passed by the presiding officers of each house of the legislature, contained this section 23:

“This Act takes effect September 1, 1989, except that Section 7 takes effect September 1, 1990.”<sup>157</sup>

Were this law to come before Justice Scalia, there would be no outward indication that it contained an error; in isolation, it reads very sensibly.

This illustrates the need for an analytical separation of the scrivener’s error and absurdity doctrines, though Scalia, who claims to accept the former but reject the latter, sometimes blurs the line in his definitions: “[the] doctrine of ‘scrivener’s error’ . . . permits a court to give an unusual (though not unheard-of) meaning to a word which, if given its normal meaning, would produce an absurd . . . result.”<sup>158</sup> In the Texas case, the result wasn’t “absurd” on its face—it merely shuffled the dates on which two sections of the law would take effect.<sup>159</sup> And interpreting the word “7” to mean “5” would certainly be “unheard-of” and beyond the limits of the scrivener’s error doctrine given by Scalia in the above quote. And yet, it is doubtful that Scalia would categorize this as an error of “wisdom” and not of “expression.”

Scalia’s textualism admirably emphasizes both the notice

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156. *Ass’n of Tex. Prof’l Educators v. Kirby*, 788 S.W.2d 827, 828 (Tex. 1990).

157. *Id.*

158. *X-Citement Video Inc.*, 513 U.S. at 82.

159. *See Ass’n of Tex. Prof’l Educators*, 788 S.W.2d 827.

principle and the democratic legitimacy of our laws, and is understandably skeptical about trusting unelected judges<sup>160</sup> with too much discretion in the application of those laws. But by investing the tenuous and subjective distinction between an error of “wisdom” and one of “expression” with such significance, Scalia and his followers undermine much of the clarity and predictability that textualism promises. As we have seen, answering the question of what constitutes an error of “expression” is a highly subjective and ideological determination in both literature and law.

Furthermore, some of textualism’s doctrinal features may in fact make it more difficult to detect scrivener’s errors. Textualists ordinarily eschew the use of extrinsic evidence (like legislative history) as aides to statutory interpretation.<sup>161</sup> It is not entirely clear whether Justice Scalia is willing to make an exception for scrivener’s errors. He does allow that, in cases of obvious clerical errors, a judge may “give the totality of context precedence over a single word.”<sup>162</sup> The “totality of context,” however, seems in practice to mean that the judge may speculate whether the language in question was *plausible*, as Justice Scalia did in *Holloway* (the carjacking case): “Note that I am discussing what was a *plausible* congressional purpose in enacting this language . . . . [T]he actual intent of the draftsmen is irrelevant; we are governed by what Congress enacted.”<sup>163</sup> Again, this leads us to ask: if the text before the judge is not the text that the legislature enacted, or thought it was enacting, is the actual intent of the drafters still irrelevant? May judges in such cases consult extrinsic evidence to determine the correct text? Scalia’s jurisprudence may suggest that his answer is no. In *Green v. Bock Laundry*, he approved of the consultation of “all public materials . . . to verify that what seems to us an unthinkable disposition . . . was indeed unthought of and thus to justify a departure from the ordinary meaning of the word . . . in the Rule.”<sup>164</sup> But once again, this seems to be closer to

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160. Scalia, *supra* note 13, at 22. One wonders whether textualists consider the “judicial activism” of *elected* judges to be any more legitimate.

161. *Id.*

162. *Id.* at 20–21. Does the reference to a “single word” mean that Scalia’s scrivener’s error doctrine is limited to mistakes of a single word?

163. *Holloway v. United States*, 526 U.S. 1, 19 n.2 (1999) (Scalia, J., dissenting).

164. *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 527 (1989) (Scalia,



an application of the absurdity doctrine than of the scrivener's error doctrine, a case in which the statutory text suggests an error on its face. Would Scalia entertain an argument that a statute which is not absurd on its face is nevertheless an inaccurate transcription of the terms agreed upon by the legislature?

In *United States v. Munoz-Flores*,<sup>165</sup> Scalia quoted approvingly *Marshall Field's* support for the "enrolled bill rule": "that federal courts will not inquire into whether the enrolled bill was the bill actually passed by Congress . . ."<sup>166</sup> Scalia's support for the unimpeachability of statutes suggests that he might enforce a statute even in the face of evidence suggesting that the text of the statute was not the text the legislature thought it was voting on, provided that a "plausible" legislative purpose could be theorized for the language as it stood. It should be noted, however, that Scalia did not invoke the enrolled bill rule in *Munoz-Flores* to argue that courts may not examine evidence that a published statute is incorrect due to a clerical error, but instead to contend that the Court should not inquire into whether an appropriations bill properly originated in the House, as per the Revenue-Origination clause.<sup>167</sup> But although the facts of *Munoz-Flores* are distinguishable from those of *Texas Professional Educators*, Scalia's enthusiastic quotation from *Marshall Field*—"a bill that has passed Congress should be deemed complete and unimpeachable . . ."<sup>168</sup>—suggests a broad approval of the enrolled bill rule. It is not clear what the combination of the enrolled bill rule and Scalia's scrivener's error doctrine would mean in practice. Would Scalia decide the *Texas Professional Educators* case differently than the Texas court, which held that "an exception to the enrolled bill rule must exist to avoid elevating clerical error over constitutional law"?<sup>169</sup> Would he "correct" a statute whose language led to absurd results for

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J., concurring).

165. *United States v. Munoz-Flores*, 495 U.S. 385 (1990).

166. *Id.* at 408 (Scalia, J., concurring) (citing *Marshall Field Co. v. Clark* 143 U.S. 649 (1892)).

167. U.S. CONST. art. I, § 7, cl. 1.

168. *Munoz-Flores*, 495 U.S. at 408 (Scalia, J., concurring) (quoting *Marshall Field*, 143 U.S. at 672).

169. *Ass'n of Tex. Prof'l Educators v. Kirby*, 788 S.W.2d 827, 829-30 (Tex. 1990); see generally *supra* notes 124-25.

which he could not imagine a “plausible” purpose, in the face of evidence that a spiteful or impish legislature did, in fact, intend the language? Would he ignore evidence that a published statute was in error?

### CONCLUSION

The scrivener’s error doctrine is an attempted solution to a conflict in the judiciary’s agency relationship with the legislature. Judges are supposed to act as faithful agents of the legislature; as the Supreme Court wrote in 1812, “[i]n construing these laws, it has been truly stated to be the duty of the court to effect the intention of the legislature . . . .”<sup>170</sup> But the constitutional mechanism by which the legislature makes its intention known is the legislative process of bicameralism and presentment. A conflict arises, then, when the constitutionally binding indication of legislative intent—namely, the text of a statute—appears at odds with some other indication of legislative intent, or a judge’s intuition of legislative intent. On this point adherents of all but the most extreme ends of the spectrum of interpretive philosophies can agree. Not even very strict textualists argue that even a clearly defective text should always be followed.<sup>171</sup> On the other hand, some advocates of “evolutionary” or “dynamic” statutory interpretation eschew the agency model altogether in favor of a partnership relationship between judges and legislators, but even so, few would not concede that the statutory text is a powerful constraint on freewheeling interpretation.<sup>172</sup> The point of divergence between differing interpretive theories, then, would seem not to be whether or not to correct errors in laws, a point about which almost all agree. The crucial question for judges is not so much what to do with an error, but rather what constitutes an error in the first place. Similarly, textual critics, whose goal is “to attempt to establish the text intended by the author at a

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170. *Schooner Paulina’s Cargo v. United States*, 11 U.S. (7 Cranch) 52, 60 (1812).

171. Scalia, *supra* note 13, at 3, 20.

172. See, e.g., William N. Eskridge, Jr., *Symposium on Statutory Interpretation: Legislative History Values*, 66 CHI.-KENT L. REV. 365, 438 (1990) (“[J]udges interpreting statutes are more like ‘partners’ with the legislature and the executive in the ongoing enterprise of government, than they are like ‘agents’ implementing the directives of the legislative principal.”).

particular time, . . .”<sup>173</sup> agree that errors that are contrary to authorial intention should be corrected, but in order to accomplish this, they must answer the same question that judges do; what is an error?

Ultimately, Scalia’s textualism reflects a concern about the place of judgment in law. Textualists are more comfortable leaving complex ideological decisions to legislators, who at least have the virtue of being democratically accountable. As John Manning writes, “The legislative process is untidy, and the particular wording of a statute may have been, for unknowable reasons, essential to its passage.”<sup>174</sup> Thus, he explains, “[i]n a system marked by legislative supremacy (within constitutional boundaries), federal courts act as faithful agents of Congress. . . . Textualists therefore believe that the only safe course for a faithful agent is to enforce the clear terms of the statutes that have emerged from that process.”<sup>175</sup> But perhaps textualists’ distrust of judges leads them to place too much trust in text. Manning’s statement depends on the assumption that the terms of a statute are not only “clear,” but also that “the particular wording” is, in fact, the same wording that came through the untidy legislative process. As we have seen, to partake of language—and especially written and published language—is to accept the inevitability of error. Textual critic D. C. Greetham manages to acknowledge both the duty owed by an editor to an author and the reality that errors are unavoidable:

Being a [textual] critic means being sensitive to another person’s quirks and peculiarities; it means that the critic must by an almost phenomenological leap, “become” that other person while preparing the text for publication. . . . It means using a critical attitude to all evidence that a text brings with it, not taking anything merely on faith and not believing that anybody is completely free from error.<sup>176</sup>

On this subject, textual critics have several thousand years of experience. In textual criticism, as in law, theories have been put forth to constrain the perceived excesses of

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173. TANSELLE, *External Fact*, *supra* note 80, at 73.

174. Manning, *supra* note 14, at 2486.

175. *Id.* at 2389–90.

176. GREETHAM, *supra* note 46, at 296.

editors who seemed too willing to emend texts, subject only to their whims, or to unverifiable speculation—like Bentley, resorting to conjecture in order to correct the work of Milton's unfaithful amanuensis.<sup>177</sup> As Tanselle writes, certain "textual critics have felt impelled to construct methods of procedure which tend toward the elimination of individual judgment . . . ."<sup>178</sup> These critics were often "motivated by a desire to counteract the practice . . . of choosing among variant readings in a wholly unsystematic way according to the whims of personal taste."<sup>179</sup> According to Tanselle, however, "the pendulum has swung back from [a] position of extreme conservatism to a middle position which gives literary judgment, when carefully applied, its proper place in editorial decisions."<sup>180</sup> Such a middle position is also appropriate as regards the scrivener's error doctrine in law. As the famed textual critic W. W. Greg wrote,

Uniformity of result at the hands of different editors is worth little if it means only uniformity in error; and it may not be too optimistic a belief that the judgement [*sic*] of an editor, fallible as it must necessarily be, is likely to bring us closer to what the author wrote than the enforcement of an arbitrary rule.<sup>181</sup>

As appealingly commonsensical and admirably democratic as Scalia's textualism may be, it can avoid the subjective judgments and extra-textual evidence necessary to identify clerical errors only by countenancing unjust outcomes.

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177. See *supra* text accompanying notes 76–79.

178. G. THOMAS TANSELLE, *Textual Study and Literary Judgment*, in TEXTUAL CRITICISM AND SCHOLARLY EDITING, *supra* note 57, at 325, 326.

179. *Id.*

180. *Id.*

181. W. W. GREG, *The Rationale of Copy-Text*, in COLLECTED PAPERS 381 (J. C. Maxwell ed., 1966).

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